

ATTACHMENT 2

PRINCIPLES FOR A NEW ACCESS REGIME

Design Principle 1

The objectives and pricing principles for a new access regime must be guided by Part IIIA of the Trade Practices Act and other recently revised industry-specific access regimes.

Background

Australian governments have over the past five years pursued a greater degree of consistency between the objectives and pricing principles of the generic national access regime contained in Part IIIA and industry-specific access regimes such as those covering electricity, gas, rail and port infrastructure facilities. These reforms also have reflected important lessons learnt about the impact of access regulation on investment and the appropriate institutional arrangements for access decision making. Industry-specific regimes, such as those that apply to the telecommunications industry, place additional burdens upon regulators and the industry, as the experience and knowledge gained in one industry cannot readily be translated across others, and the separate administration of a one-off regime for one industry creates additional cost and procedures.

The goal of greater alignment has been pursued both by direct reforms of access regimes (in the case of electricity and gas), or by agreed national infrastructure reform processes that seek to provide more standardised high level objectives and pricing principles for State and Territory access regimes (for example, through the 2006 Competition and Infrastructure Reform Agreement).

This Design Principle seeks to extend this process to telecommunications to bring about greater consistency between the telecommunications regime and recently amended national and industry-specific arrangements. Indeed, a specific guiding object of Part IIIA is to provide guiding principles for other infrastructure access regimes.

Telstra proposes objectives and pricing principles for a new regime that are modelled on the objectives and pricing principles in Part IIIA. These principles and objectives are also consistent with those established by recent intergovernmental agreements as appropriate for inclusion in regimes governing access to rail and port infrastructure. They are also broadly consistent with the objectives, revenue and pricing principles contained in electricity and gas access regimes.

Implementation principles

- A new telecommunications access regime should be developed by 1 July 2010
- The objects clause of the new regime should be focused on the goal of economic efficiency and based on the objects clause of Part IIIA of the Trade Practices Act

- A new regime should contain legislative revenue and pricing principles based on those contained in Part IIIA of the Trade Practices Act

Design Principle 2

A new regime should clearly separate the roles of policy making, rule-making and economic regulation, with each of these roles undertaken by a separate body or decision-maker.

Background

Both the Part IIIA and energy access regimes feature a clearer separation of a range of different roles that are required to be undertaken under an access regime. Part IIIA, for example, assigns to different parties the functions of recommending whether regulation should apply, decision-making on the scope of regulation, and determining the terms and condition of access. Under energy access regimes this separation is even more developed, with a separation established between high-level policy development, regulatory rule-making, and administration of economic regulation.

Telstra has based its proposals in this area on agreed policy reforms contained in the 2006 Australian Energy Market Agreement, and considers there are significant potential benefits and synergies with extending a consistent policy approach to telecommunications.

Implementation principles

- The Minister for Broadband, Communications and the Digital Economy will be responsible for setting the high-level policy framework. This should be done from time to time through a Ministerial Policy Statement.
- The Minister will also be responsible for making determinations following non-binding recommendations of the National Competition Council on whether a telecommunications service should be subject to access regulation, or whether such regulation may be removed.
- The new access regime will consist of primary law and statutory rules made by an independent rule-making body.
- The independent rule-making body should make subordinate statutory rules dealing, for example, with the detailed aspects of the economic methodologies of implementing price regulation.
- The ACCC will have the task of implementing the subordinate statutory rules referred to above, and as such will carry out the regulatory and enforcement functions under the new access regime, including the function of dispute resolution, which are to be carried out consistent with the statutory rules.

Design Principle 3

The new regime should only apply third party access price regulation to genuine bottleneck infrastructure where regulated access is required to promote a material increase in competition.

Background

This principle is achieved by providing a threshold for the regulation of bottleneck telecommunication services which is modelled on the recently revised declaration criteria under the national access regime in Part IIIA. As in Part IIIA, for infrastructure to be treated as a bottleneck, and therefore subject to regulation, it must be established that the facility is uneconomic to duplicate.

The Part IIIA declaration criteria have been recently revised to require that access promotes a "material" increase in competition, in part in recognition of the need to avoid incurring the costs and risks of regulation in situations where the competition promoted would be trivial. This higher threshold also promotes a stronger focus on direct infrastructure-based competition.

It is also proposed, consistent with the gas access and national access regimes, that the decision to declare a service should be accountable through merits-based review. This is important given the potentially critical implications of price-based regulation for the property rights and legitimate business interests of the provider of the service.

Implementation principles

- A new regime would contain declaration criteria for telecommunications services requiring that a service must not be declared to be subject to regulated third party access unless the Minister for Broadband, Communications and the Digital Economy, following a recommendation of the NCC, is satisfied of all of the following matters:
 - (a) that access to the service would promote a material increase in competition in at least one market, other than the market for the service;
 - (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) that the facility used to provide the service is of national significance, having regard to:
 - i. the size of the facility; or
 - ii. the importance of the facility to constitutional trade and commerce; or
 - iii. the importance of the facility to the national economy.
 - (d) that access to service can be provided without undue risk to human health or safety; and
 - (e) that access to the service would not be contrary to the public interest.

- Consistent with Part IIIA, the decision to declare or regulate a service should be eligible for merits-based review to the Australian Competition Tribunal.

Design Principle 4

The regime should contain key guiding principles in legislative form, but include scope for flexible statutory rules allowing the regime to adapt to market developments, administered by an independent rule-making Commission.

Background

An increasing trend in the development of energy access regimes has been the adoption of a 'two-tiered' statutory framework with key elements of the access regime (such as objectives, pricing principles, and substantive rights and obligations) contained in legislation, being supplemented by more specific, detailed statutory rules. Part IIIA does not adopt this particular approach, as it is a generic regime which is not addressed at meeting the particular needs of a particular infrastructure sector.

As is the case with electricity and gas, there is a need in telecommunications for a 'lower layer' of statutory rules that provide clear and specific guidance to the regulator and to market participants, and which are also capable of being changed from time to time in line with evolving market circumstances and best regulatory practice, without requiring changes to the legislation under which they are adopted. Putting the regime into two tiers also allows Parliament to retain control over the core rights and obligations contained in the primary law, while enabling the task of developing the machinery of regulation to be placed in the hands of an organisation with appropriate technical, legal and industry expertise. This also allows the process of detailed rule-making to be subject to extensive industry consultation.

The scope under Telstra's proposed new regime for the statutory rules of an access regime to be changed to reflect evolving market circumstances and regulatory practice has been adapted from agreed reforms to national energy access regimes, including the establishment of an Australian Energy Market Commission (AEMC).

The approach of providing the rule-maker with a task of establishing initial statutory rules is modelled on the approach recently applied in developing new economic regulatory rules for electricity transmission.

Implementation principles

- The primary law should establish the architecture of the regulatory framework and contain an objects clause, revenue and pricing principles, a rule making test, set out the primary rights and obligations of access providers and access seekers, and also define the powers of the regulator and other decision-makers under the regime.

- The statutory rules should provide specific and transparent guidance to the ACCC on economic methodologies for implementing price regulation, the scope of ACCC discretion in respect of individual elements of proposed access undertakings, and the detailed operation of regulatory decision and consultation processes
- The rule-maker should be established as an independent body not subject to Ministerial direction.
- The rule-maker is to consist of three Commissioners with members nominated by the Minister for Broadband, Communications and the Digital Economy.
- Of these three Commissioners it should be a requirement that one member is also a Commissioner or Associated Commissioner of the Productivity Commission, one member is a current Commissioner of the Australian Energy Market Commission (to facilitate consistency), and one member is a person with substantial industry expertise in telecommunications.
- The primary task of the rule-maker once established should be to draft a set of initial statutory rules based on the rule making criteria outlined under Design Principle 5.
- The rule-maker should be required to make this set of initial statutory rules by 1 July 2011.
- After initial statutory rules are in place industry participants should have the capacity to seek amendments to the rules with amendments to be considered through a public consultation process by the rule-maker.

Design Principle 5

There should be a presumption in favour of achieving and maintaining greater consistency between the framework, objectives and guiding principles of the telecommunications access regime and other access regimes, with mechanisms to give this presumption effect.

Background

This principle gives effect to the object of Part IIIA to provide a framework and guiding principles to encourage a consistent approach to access regulation in each infrastructure sector.

The principle is reflected in Telstra's proposal by specific reference to this objective in the rule-making test, and the provision for regular review by an independent body which is directed to specifically consider this objective. The general form of the rule making test established below is modelled on the rule-making test established by Australian governments under recently revised national electricity and legislation.

The benefit of this rule making test is that it links the assessment of prospective changes to statutory rules directly to whether the overarching objectives of the regime will be advanced, while statutory rules are not permitted to undermine the high level guiding principles set by Parliament in legislative form, e.g. the objects and revenue and pricing principles.

To achieve initial consistency between the proposed new regime, Part IIIA and the other regimes, there are also a number of other required elements. These include defining the scope of ACCC discretion to accept or reject an undertaking under the new telecommunication regime, and ensuring consistency of accountability mechanisms such as merits review across all access 'avenues' provided by the new regime. In addition, there is also a need to ensure alignment of legislative elements of the national access regime and any new telecommunications access regime in the context of a review of Part IIIA currently scheduled to be undertaken in 2011.

Implementation principles

- In making initial statutory rules or amending the rules the rule-maker should be required to be satisfied that:
 - (a) the proposed rule will or is likely to contribute to the achievement of the regime objects clause; and
 - (b) the proposed rule is consistent with the revenue and pricing principles set out in the primary law; and
 - (c) that to the extent possible the proposed rule:
 - i. is consistent with the principles for access regimes provided in clause 6 (4) (a)-(m) of the Competition Principles Agreement 1995 and clause 2.2-2.4 (a) and (b) of the Competition and Infrastructure Reform Agreement 2006; and
 - ii. promotes the objective of consistency between the operation and guiding principles established by Part IIIA and industry specific access regimes, thereby giving practical effect to section 44AA (b); and
 - iii. is consistent with electricity and gas access regimes regarding the scope of regulatory discretion to accept or reject individual elements of a service provider's access proposal, unless such consistency is impractical and/or would be inconsistent with the other requirements listed in this document.

- The ACCC shall only have discretion to accept or reject a proposed access undertaking under the new regime, and be obliged to specify the amendments it would require to approve any revised undertaking put forward by the service provider.
- Consistent with Part IIIA, there should be consistent access to merits review applying to all access avenues that impose terms and conditions of third party access – including decisions to reject an access undertaking or arbitral decisions
- In regular reviews of the new access regime provided for under Design Principle 6, a specific matter for consideration should be the goal of ensuring maximum practical consistency between the new regime and the national access regime contained in Part IIIA, and best practice elements of other industry-specific access regimes operating under Part IIIA.
- Legislative elements of the new telecommunications access regime shall be brought into alignment with any changes to equivalent provisions of Part IIIA of the Trade Practices Act as soon as feasible following a scheduled review of Part IIIA due to be undertaken by October 2011.

Design Principle 6

Both the legislative regime and detailed statutory rules should be subject to regular review to ensure they remain relevant and appropriate given evolving technology and competitive possibilities.

Background

The provision for regular reviews of access regimes is an agreed element of regulatory best practice.

The Australian Government has committed to a review of the national access regime contained in Part IIIA by 1 October 2011, and existing telecommunications provisions of Part XIB contain a trigger for a similar review on which Telstra's proposal is closely modelled. The principles below also utilise existing institutional and legal requirements surrounding Productivity Commission inquiry processes.

Implementation principles

- The new access regime will include a requirement for regular reviews of its operation.
- The initial review will occur within 3 years, with a requirement for reviews at five yearly intervals from that date.
- Each review should be commenced by the Treasurer and Minister for Broadband, Communications and the Digital Economy providing a formal reference for an inquiry by the Productivity Commission.

- In conducting the review, the Productivity Commission must give consideration to whether any or all of the provisions of the access regime and Part XIC should be repealed or amended.
- The Productivity Commission must consult publicly and publish a draft and final report, which is to be tabled before Parliament within 15 sitting days of its completion.

Design Principle 7

A new access regime should contain specific mechanisms to facilitate new investment, including provision for upfront certainty on the scope and form of regulation, and measures to address the risk of regulatory truncation of returns from new investment.

Background

An important part of any access regime is to ensure it fosters incentives for efficient new investment whilst not distorting economic decisions around investment in new or existing assets.

Under the gas access regime a suite of measures has been developed and implemented over the past two years by Australian governments with the objective of removing any regulatory disincentives around major new pipeline developments.

This has included the capacity to obtain binding 15-year ruling prior to investment precluding access pricing regulation being imposed, price regulation exemptions and lighter handed price monitoring regulatory approaches for pipelines deemed not to hold significant market power. Many of these mechanisms have at their core the concept of providing upfront regulatory certainty to actual or potential investors, and reducing the risk of 'regulatory truncation' arising in relation to greenfield projects.

Similar mechanisms may also provide a model for the telecommunications access regime. For example, it is proposed to alter the decision-maker responsible in relation to exemptions under any new access regime to align with the role for Ministerial determinations on declaration of infrastructure under Part IIIA of the Trade Practices Act.

Implementation principles

- The new access regime should include specific mechanisms based on existing greenfield mechanisms approved under the National Gas Law for major gas transmission pipelines and networks
- Specific consideration should be given to binding exemptions from price-based regulation and options for lighter handed forms of price monitoring to apply where a service provider may possess substantial market power but the costs of price regulation are not justified
- The new access regime shall contain a system of ordinary class exemptions, anticipatory class exemptions, ordinary

individual exemptions and special access undertakings as per sections 152AS-152AV, 152CBA-CBI of Part XIC

- Decisions on the provision of exemptions should be made by the Minister for Broadband, Communications and the Digital Economy, with a recommendation to be provided by the ACCC
- The ACCC should continue to make decisions on the acceptance or rejection of a special access undertaking

Design Principle 8

There should be a certain and clear transition path, including the movement of potential regulation of telecommunications services to the new regime at the expiry or revocation of relevant declarations, undertakings, exemptions, or within 3 years, whichever occurs first.

Background

This principle is required to provide regulatory certainty to all market participants, and to protect reasonable expectations and commercial dealings undertaken under existing arrangements.

From the development of the statutory rules, there should be the option for services to be moved on a voluntary basis by the service provider to the new regime. In addition, as existing declarations, access undertakings, special access undertakings, or exemptions naturally reach their expiry dates any future regulation of the services these arrangements cover should be undertaken under the new regime. Finally, to ensure that recent and upcoming regulatory determinations do not unduly defer the effective entry into force of the new regime, it is proposed that any such determinations be automatically time-limited to expire, in order that new arrangements may be made under the new regime within 3 years.

The movement of access regulation to a new regime only following the expiry of current regulatory determinations is consistent with transitional arrangements adopted in national reforms to energy access arrangements.

Implementation principles

- The new regime should contain transitional provisions requiring that third party access terms and conditions for the use of regulated services shall continue under Part XIC until the expiry of declarations, access undertakings, special access undertakings, or any exemptions, or the expiration of 3 years from commencement of the new regime, whichever occurs first.
- As declaration, undertakings, and exemptions expire, decisions on services that were previously treated under these Part XIC mechanism will automatically become subject to the terms of the new access regime – i.e. future decisions on the declaration, regulation or exemption of these services are governed by the new regime.

- Any declarations, access undertakings, special access undertakings, or any exemptions made after 1 January 2009 until the making of the initial access rules will be deemed to expire by 1 July 2012, enabling these arrangements to move to the new regime in a timely fashion.
- From the date of the making of the initial statutory rules, a service provider will have the right to seek to have the declaration, access undertaking, special access undertaking, or any exemption revoked according to the relevant criteria in the new regime.